

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
GREAT LAKES CHEESE OF NEW YORK, INC.,

vs.

7:14-cv-232

AGRI-MARK, INC.,

Defendant/Third-Party Plaintiff,

vs.

BERNARD THOMAS and PENNY THOMAS
d/b/a M&T TRANSPORT,

Third-Party Defendants.
-----x

Settlement - December 16, 2016

James Hanley Federal Building, Syracuse, New York

HONORABLE GLENN T. SUDDABY

United States District Judge, Presiding

*Eileen McDonough, RPR, CRR
Official United States Court Reporter
P.O. Box 7367
Syracuse, New York 13261
(315) 234-8546*

A P P E A R A N C E S

For Plaintiff: HAHN, LOESER LAW FIRM
Attorneys at Law
200 Public Square
Cleveland, Ohio 44114
BY: DENNIS ROSE, ESQ.
CRAIG O. WHITE, ESQ.

For Defendant: SANTACROSE, FRARY LAW FIRM
Attorneys at Law
1 Columbia Circle
Albany, New York 12203
BY: SEAN A. TOMKO, ESQ.
KEITH M. FRARY, ESQ.

For M&T: WILSON, ELSEER LAW FIRM
Attorneys at Law
677 Broadway
Albany, New York 12207
BY: JOSEPH T. PERKINS, ESQ.

 KNYCH & WHRITENOUR, LLC
Attorneys at Law
300 South State Street
Syracuse, New York 13202
BY: PETER KNYCH, ESQ.

For Harleysville: RIKER, DANZIG LAW FIRM
Attorneys at Law
One Speedwell Avenue
Morristown, New Jersey 07962
BY: LANCE JON KALIK, ESQ.

For Wesco: RUSSO & TONER LLP
Attorneys at Law
33 Whitehall Street
New York, New York 10004
BY: TIMOTHY WELCH, ESQ.

Eileen McDonough, RPR, CRR
Official United States Court Reporter
P.O. Box 7367
Syracuse, New York 13261
(315)234-8546

1 THE CLERK: 7:14-cv-232; Great Lakes Cheese of
2 New York versus Agri-Mark versus M&T Transport. Counsel,
3 please note your appearance for the record.

4 MR. ROSE: Your Honor, Dennis Rose and Craig White
5 for the plaintiff, Great Lakes Cheese of New York.

6 THE COURT: Good morning.

7 MR. TOMKO: Good morning, Your Honor. Sean Tomko
8 and Keith Frary on behalf of Agri-Mark.

9 MR. PERKINS: Joe Perkins on behalf of M&T
10 Transport.

11 MR. KALIK: Good morning, Your Honor. Lance Kalik,
12 Harleysville Insurance Company. We're an insurer for M&T.

13 MR. WELCH: And Tim Welch, Russo & Toner, for Wesco
14 Insurance.

15 MR. KNYCH: Peter Knych, personal counsel for M&T.

16 THE COURT: Good morning. I thought I was going to
17 do a pretrial; it looks like I'm going to have a jury panel
18 here. I'm glad you're all here safe. A lovely time here in
19 the Northeast. It's been an interesting couple of days.

20 Let me lay out for you how I would like to proceed
21 this morning. First of all, I view this as a day which is
22 going to be your best chance to resolve this case short of
23 trial. We have a trial date in February. You know, you've
24 traveled here through some adverse conditions and I would
25 like to see this case get resolved today, that's my goal. So

1 here's how I'm going to proceed.

2 I want to hear from plaintiff's counsel first as to
3 your view of where we are with regard to settlement
4 negotiations and conversations that you've had. And then
5 I'll hear from any of the various defense counsel for the
6 various parties, anything that you would like to add or
7 subtract from their comments, so to speak. And then based on
8 where we are, I may send you out of the courtroom one at a
9 time and hear the perspective from each counsel.

10 And Mr. Knych, I think I just throw you in with the
11 M&T people and their insurance counsel and stay in the room
12 with them, because I view your interest as being the same.
13 And we'll go from there if we need to.

14 But we have a trial date, and this is on my
15 three-year list so it's got a nice big star next to it. It
16 needs to get moved and it's going to get moved one way or
17 another. So I view myself as a facilitator today. If there
18 is something that I can do to assist you and help you resolve
19 this case, that's what I want to do. Okay?

20 So plaintiff's counsel, if you could, I would like
21 to hear about your perspective of where settlement
22 conversations are and what you view as any hangups or
23 problems at this point.

24 MR. ROSE: I would be happy to, Your Honor. Can I
25 come to the podium?

1 THE COURT: Wherever you feel comfortable.

2 MR. ROSE: This case -- and the Court is aware of
3 the facts because you had the summary judgment.

4 THE COURT: I am.

5 MR. ROSE: It was a disaster that is unfortunately
6 an economic disaster right now, could have been a major issue
7 not only for us --

8 THE COURT: Not sure I would have wanted a bottle
9 of milk from there.

10 MR. ROSE: Or a sandwich with metal fibers in it.
11 It's clear to us this is a damages case in front of you, it's
12 going to be a damages case down the street in a companion
13 case that we filed against Mr. Thomas and M&T, which
14 concludes it's the same claims, punitive damages claims
15 against him and other claims.

16 Our view is since we last tried to mediate this
17 case, our case has gotten better because of the rulings that
18 you've made and the recognition that has been made about
19 what's going on in the case and the statements that have been
20 made about the case. We did have two mediations that have
21 failed for various reasons, I'm not going to comment on why.
22 Although I do think it's a fact that there is insurance
23 involved, insurance companies can't figure out what the value
24 of the case is.

25 We presented them damages evidence. Our actual

1 out-of-pocket damages in this case, including the attorneys'
2 fees that we've incurred, are upwards of a little bit less
3 than \$1.7 million and that is the 350,000 pounds of cheese
4 that had to have been disposed of, that is the plant that had
5 to be shut down for two days that had to be cleaned several
6 times because there was such fine fibers, they had to keep
7 doing it. The Court is aware that this is a highly regulated
8 industry. You have to make sure it's clean. One of the
9 problems, it includes having to dispose of the cheese,
10 includes all of those things that comes up to a little bit
11 less than a million dollars. Interest is accruing. This
12 happened in August of 2014, so for two years the interest,
13 New York interest has been accruing at 9 percent, and then
14 our attorneys' fees are on top of that, and doesn't include
15 any punitive aspect or compensatory.

16 There was a time when we were in mediation, and we
17 know that there is a million dollar Harleysville policy, the
18 only policy we were made aware of. Harleysville has a
19 million dollar limit. They said pay the limits, the mediator
20 tried to fight. No offer of limits. In fact, I think it was
21 450 is where they were at; we were at 1.2 was the demand at
22 that point in time. You have the summary judgment. You have
23 the order saying, hey, make an offer, you were ordered to do
24 that. They have to respond. We did make a global offer to
25 settle everybody for a million. And then the Wesco comes

1 into the issue and the offer that came back from Harleysville
2 was -- or, from M&T was 500,000. Come here to court and
3 we'll see if there is going to be more.

4 Right now, we talked to our client, our demand
5 right now to settle is 1.5, which is a discount over what we
6 think we would get in the case, a discount over what we would
7 get in a punitive case against Mr. Thomas and M&T. I say
8 Mr. Thomas, because M&T is a DBA, so he never was
9 incorporated, so it really is him personally that's involved
10 in this case. But we do know that there is Agri-Mark,
11 secondary over their carrier, available. You got M&T and
12 their carrier, you got Mr. Thomas, you got Wesco. There's a
13 lot of pockets over here to make us whole.

14 And I want to pause for a second on Agri-Mark.
15 They were the people who we sued because they sold us the
16 milk; it was tainted. They're the ones who used M&T to
17 deliver the milk. And there is no doubt about it, they tried
18 to defend it was someone else's truck. There's no doubt in
19 this instance it was their truck. They didn't clean it, was
20 full of this debris, and it contaminated our plant, no doubt
21 about it.

22 We tried to get it done the way apparently it
23 happens in the industry up here, in the dairy industry, the
24 cheese, everyone does right by everyone else. Hey, it's our
25 problem, we're going to take care of your issue, and for

1 whatever reason it didn't happen. We were forced, we were
2 urged by Agri-Mark, sue us so we get this thing moving and
3 get this claim handled. Which we did. And instead of saying
4 let's face up to what's your harm, aggressively defended by a
5 bunch of different people, including Mr. Thomas coming to the
6 view of it's somebody else's truck, I did wash it, I didn't
7 wash it. That's a fact issue you're going to have. They
8 never faced the issue that we're now here, which is a damages
9 case. It's two and a half years later, we're still doing
10 business with Agri-Mark. M&T is still delivering because
11 it's a small world, a dairy world.

12 We would like to get it done today. But we're
13 willing to try the case, if need be, whether it's here and
14 over there or whether we consolidate that state case here.
15 And I'm willing to stand in front of a jury and tell them
16 what happened and say I want you to compensate us for what
17 happened in this case.

18 So that's where we are. Are we not going to move
19 at all, we can't say, but we really think that this group
20 should come together and find a way to make us whole.

21 THE COURT: Okay. Thank you. I neglected to
22 initially say it would be my view that hopefully today it
23 would be a global settlement, that it would resolve the
24 Southern District case and the state case. I mean, it just
25 makes sense. And from this day forward, you know, it will be

1 a very short period of time where pretrial motions are going
2 to have to be made, there is going to be a lot of
3 expenditures very, very quickly. Again, so that's why I say
4 today's the day, and I emphasize that.

5 Any of defense counsel want to be heard, starting
6 with Agri-Mark and then we'll go from there?

7 MR. TOMKO: Just briefly, Your Honor. Certainly
8 you understand our position on the motion. You know,
9 Agri-Mark really didn't do anything wrong here. It's the
10 hauler. We think we've proved the case against the hauler.
11 We think that ultimately any damages incurred by Agri-Mark
12 are going to flow through to Mr. Thomas. Whether or not he
13 has sufficient coverage to cover that it is a problem that
14 Mr. Thomas and Harleysville have and Wesco.

15 Certainly we are here. I have an adjuster, an
16 insurance adjuster available by phone. I have my client
17 available by phone. As Mr. Rose pointed out, there is
18 continued business operations and certainly that we are here
19 in good faith to try to make this matter help it to be
20 resolved.

21 THE COURT: Okay.

22 MR. PERKINS: Judge, you wrote a rather
23 comprehensive decision and order regarding the federal court
24 motion. The only thing I'm not sure about is I thought I
25 heard Dennis say the demand was 1.5 million. I do have

1 correspondence where the demand says GLC's willing to settle
2 all claims against all parties for \$1 million. That's
3 correspondence dated October 14th of this year. That having
4 been said, I think you have everybody in the room that you
5 need to settle this case here today.

6 THE COURT: Okay. Thank you. Counsel? Anybody
7 else? Do you want to say anything?

8 MR. KALIK: Your Honor, we issued a general
9 liability policy and I think you're aware we filed a
10 declaratory judgment action in the Southern District against
11 Wesco primarily.

12 THE COURT: And there you are sitting at the same
13 table with them. I hope you're getting along.

14 MR. WELCH: There is a seat between us, Your Honor.

15 MR. KALIK: I'm being very friendly. We believe
16 that this was an auto related use, this arose of the use and
17 maintenance of an auto, and that's really going to be a
18 pretty simple issue to resolve in the Southern District.
19 Nevertheless, we've come here today ready to talk and at the
20 right time I would appreciate the opportunity for M&T's
21 defense counsel and myself and Mr. Knych to speak with you
22 confidentially and let you know what our position is and try
23 and move this forward.

24 THE COURT: Okay. You have an opportunity to get
25 up and speak. You haven't been in it as long as everybody

1 else.

2 MR. WELCH: Not at all, so I'll speak less and
3 respect that. Obviously, we have an auto policy here. It's
4 our position that coverage is not afforded for this accident.
5 We understand there is a DJ action that is ongoing. We also
6 will at least listen and if appropriate maybe participate.

7 THE COURT: How far along are you in the Southern
8 District?

9 MR. KALIK: We're just starting, Judge. Pleadings
10 have been -- I think almost everybody has filed responsive
11 pleadings. Our preliminary initial conference I think is in
12 January, early January.

13 THE COURT: Have you had an opportunity to talk at
14 all? Have you had a chance to look at this and see what it's
15 all about and make some evaluation?

16 MR. WELCH: My senior partner has and he is
17 available to me by phone. And I know Lance has spoken
18 directly to him, so they have some communication going on.

19 THE COURT: Okay, good. Pete, do you want to throw
20 anything in?

21 MR. KNYCH: Very briefly, Judge. My clients are
22 two individuals, Bernard and Penny Thomas. They are hard
23 working people up in Northern New York. They have a milk
24 trucking business. They bought the insurance that you're
25 supposed to buy, an auto policy with a million dollars and a

1 GL policy with a million dollars. We've got two insurance
2 companies, two smart guys that can't figure it out as to who
3 has to pay. We had an opportunity to settle this case for a
4 million dollars, but the carriers were in a dispute and
5 consequently that opportunity appears to have been lost.
6 But, you know, my client needs this case settled and he needs
7 it settled today.

8 THE COURT: Okay. Thank you. Why don't we do
9 this. I'm going to ask everybody to step out of the room
10 except for plaintiff's counsel for a minute, and then we're
11 going to bring you in at various times, I want to talk to you
12 a little bit. We're going to go off the record at this
13 point. We'll have off-the-record conversations so that they
14 can speak freely and not have to worry about something on the
15 record. And we'll go back on the record when we have an
16 agreement.

17 (Recess for discussions off the record.)

18 THE COURT: We're back on the record. Here's the
19 situation. I thought we were going to resolve this, and I
20 think we would but Wesco has taken the position that they're
21 not going to contribute -- they would contribute a nominal
22 amount today, but without an assurance from them that they
23 would not contest the reasonableness of a settlement.
24 Because it became clear to me that these two insurance
25 companies were not going to be able to resolve their issues

1 with regard to contribution. So the next step for me was to
2 get everybody else up and let the insurance companies
3 litigate this. And the only way that that could happen is if
4 they agreed that they would not contest the reasonableness of
5 any settlement that I reach with all the other parties here
6 today. They are not willing to do that.

7 So from my view that ends the discussion. There is
8 no point in everybody else putting up money, going through
9 this dance and trying to resolve it with the other parties if
10 they do not agree to even say that we won't challenge the
11 reasonableness of the settlement that you reach with the
12 other parties, Judge. They won't accept that.

13 So I don't see, unless somebody has some
14 suggestions, of any other way to resolve this. You know, I
15 was perfectly willing to let them fight it out in the
16 Southern District, but that's apparently not going to happen.
17 It's going to happen but after we're done trying this case.

18 MR. KALIK: Judge, that's disappointing to hear. I
19 suppose an alternative to Wesco -- and I assume it's Wesco
20 that won't agree, because we certainly would agree that the
21 settlement was reasonable. But I suppose an alternative, and
22 I'm just thinking sort of out loud here, is that we could
23 put -- if terms were reached, and I don't know if terms are
24 on the verge of being reached, but if they were reached, we
25 could put it on the record here and Your Honor could opine as

1 to whether it was a reasonable settlement.

2 THE COURT: Well, I think in the range that I'm in
3 in trying to resolve this case, I think it's perfectly
4 reasonable, and it would take some contribution from a lot of
5 different people. But, quite frankly, what I opine about a
6 settlement is, you know, of no moment really when it comes to
7 your litigation, and I'm not going to sit here and try to
8 suggest to you that it would be.

9 You know, the issue here is, and I have to agree
10 with counsel, you know, for Mr. Thomas, these insurance
11 companies, you need to get your acts together, quite frankly.
12 It's on the verge of being outrageous that this isn't
13 resolved. And today was your best chance. And the fact that
14 it isn't getting resolved is again, I can't believe it, quite
15 frankly.

16 And I've expressed this to Mr. Welch, I'm not
17 hiding anything from anybody else. This case can be
18 resolved. But, you know, you two insurance companies need to
19 sit down and think long and hard about what you're doing and
20 do it quickly because there is some significant issues with
21 regard to, you know, what you're doing with your
22 responsibilities to your clients.

23 MR. KALIK: And, Your Honor, just so that the
24 record is clear from my client's perspective, although we
25 thought that an agreement not to challenge the reasonableness

1 of the settlement was a very reasonable request, I just want
2 to make it clear that our money's not contingent on that, if
3 we put on the record the terms of the settlement and the
4 Court gave the opinion that it was reasonable in its view,
5 and whatever effect it had, it had, and we would be willing
6 to take that risk. But my client has put its full limits on
7 the table and, you know, we've done I think as much as can be
8 expected. So I just want to make sure that the record is
9 clear from that respect.

10 THE COURT: Mr. Knych, go ahead.

11 MR. KNYCH: Judge, we have a letter from
12 plaintiff's counsel, and I think Joe Perkins referenced it,
13 it's October of 2016, saying a million dollars would settle
14 this claim. The carriers each have the million dollars
15 potentially. But I'm just wondering, and I have not gotten
16 any -- I haven't got a decision yet from my client with
17 respect to what Your Honor and I talked about, but I'm just
18 asking myself if we did come to a settlement number in this
19 tort action and it was fully funded subject to Wesco agreeing
20 that it's reasonable, that might put some additional pressure
21 on Wesco once that's on the record, to have to officially go
22 on the record and say there is a number, Judge, the attorneys
23 that negotiated have said it's reasonable, including what is
24 potentially Wesco's defense counsel, Joe Perkins.

25 MR. PERKINS: I am not Wesco.

1 MR. KNYCH: Well, potentially you are if, in fact,
2 Wesco has a duty to defend. We have defense counsel that I
3 think can opine that a number is reasonable. And if Wesco's
4 attorney stands up and says we are not going to consent to
5 that, and it ultimately is determined in a declaratory
6 judgment action that they did have a defense and
7 indemnification obligation, that may be additional evidence
8 of what may be bad faith claims handling.

9 But I understand it may take a number of more hours
10 by the Court to achieve that objective and just getting the
11 tort plaintiffs to agree to a number. Whether the Court is
12 willing to do that, I don't know. But I'm certainly willing
13 to continue my efforts with my client.

14 MR. PERKINS: Judge, I have a letter, for the
15 record -- are we on the record, Judge?

16 THE COURT: We are on the record.

17 MR. PERKINS: I have a letter from the plaintiff's
18 attorneys dated October 14, 2016, it says, "Even though the
19 posture of the case has improved for GLC since the mediation,
20 it remains willing to settle all claims against all parties
21 for \$1 million." I came here on behalf of M&T today. I came
22 with the full policy limits of \$1 million willing to
23 contribute them toward the settlement of this action. And I
24 don't understand. And it needs to be said for the record, I
25 think that is a reasonable settlement.

1 MR. ROSE: Your Honor, first off, that offer was
2 made, it was rejected. And when it was rejected, I said if
3 we show up and there is more money and you're going to offer
4 your limits, we're not settling with everybody, we have
5 Agri-Mark still in the case. And they knew that coming in.
6 We also had this conference delayed.

7 THE COURT: When you say it was rejected, when was
8 it rejected and in what form was it rejected?

9 MR. ROSE: On the phone I asked him to send me a
10 letter. He sent me a letter saying we offer \$500,000.
11 Offering 500,000 means you reject that. So that's that. So
12 that letter is gone.

13 THE COURT: It's of no moment.

14 MR. ROSE: We didn't have this conference in
15 November, as you may recall, because Wesco needed time. This
16 position that they're taking, they didn't need time. We're
17 here. I'm going to file a motion to hold Wesco in contempt
18 if nothing else to pay whatever it's costing our client to go
19 through this ruse when we said, hey, if we want to try it,
20 we'll try it, way back when. But it was because Wesco kept
21 needing more time. And this puts us in a position, a legal
22 position they didn't need more time for.

23 So it was outrageous that they have dragged us here
24 and taken this position. And we're still willing to talk
25 about our number, as we said before in private, to see if we

1 can resolve the case in some manner.

2 MR. PERKINS: I am willing.

3 MR. ROSE: Whether it's a million or a million plus
4 more, whatever it is. But we're not a million right now.
5 And we're willing to talk. And it sounds like everyone other
6 than Wesco is willing to say we'll abide by it and
7 Harleysville is willing to roll the dice. And we're not
8 walking out because we think we were done with negotiating.
9 I don't think anybody is really done. I think we were trying
10 hard before this road block.

11 MR. WELCH: Respectfully, Wesco was a late add to
12 this party. This is a litigation that's been going on for
13 two years without us, and everybody else at this table has
14 significantly more information and is in a better position to
15 value the case. And the fact that my client is not in a
16 position to be able to waive any right it has, including the
17 right to contest reasonableness here. And, frankly, this
18 letter, which I understand may have been off the table, is
19 clear evidence. If this case is settled for north of a
20 million dollars and we have a letter from plaintiff's counsel
21 saying they would take a million dollars, it's certainly
22 reasonable to change that position, and maybe the new number,
23 whatever it is, is not reasonable. I'm not saying we're
24 taking that position. All I'm saying is we reserve that
25 right to protect my client.

1 THE COURT: Mr. Welch, the difficulty here from my
2 perspective is I did delay this conference to give you and
3 your client an opportunity to review this situation and come
4 here with a good faith opportunity to negotiate and try and
5 settle this case and whatever that contribution was going to
6 be. And if you're telling me you didn't have enough time,
7 you should have notified this Court that you needed more time
8 so that we're not all traveling here in the type of weather
9 that people had to travel in to come here and waste my time,
10 quite frankly.

11 MR. WELCH: We are here with authority. The fact
12 is Harleysville doesn't want to agree to the terms that are
13 agreeable to us and could be agreeable to the other parties
14 because they want to continue a DJ action, which is I guess
15 their right. If they do not want to continue the DJ action,
16 we can all come up with a global number and this case can go
17 away, as well as the state court action and the DJ action,
18 and we can all go home and have a great holiday.

19 THE COURT: But your authority to settle this case
20 is nowhere near where anybody's going to consider that at
21 this point, and I've tried to relay that to you. And that's
22 not going to change, correct?

23 MR. WELCH: Well, the Court offered an additional
24 counter, another number, I did go back and was approaching my
25 people with. Then the story changed about we also have to

1 concede the reasonableness issue.

2 THE COURT: Okay.

3 MR. KNYCH: Wesco may be here with settlement
4 authority, but with all due respect, it also needs to be here
5 recognizing the interest of its insured, my client, to act in
6 good faith, to concede that, which it recently can concede,
7 so that the issues can be narrowed and potentially this case
8 could be settled.

9 What can save the Court a lot of time, if the Court
10 was even inclined to consider what I suggested, is a
11 question. And I'm not going to ask a question directly, I'll
12 defer to the Court. The question to Mr. Welch would be, even
13 if the settlement were a million dollars, is he here today to
14 basically assert that he would not, on behalf of his client
15 would not consent or concede that that's reasonable and would
16 not allow Harleysville to fund that settlement for a million
17 dollars? Because if the Court asks that question and he
18 basically says, that's correct, Judge, I do not have
19 authority.

20 THE COURT: I think he has answered that question
21 and he has said that they will not consent.

22 MR. KNYCH: Not even for a million dollars would be
23 my question for him.

24 THE COURT: I'm not going to speak for you,
25 Mr. Welch.

1 MR. WELCH: Your Honor, I do not have the authority
2 to waive that at the moment.

3 THE COURT: Even if I was able to resolve this with
4 all the other parties, which is why I've demonstrated the
5 frustration that I have, they're not going to consent to
6 that. And so, you know, that's why I say I think we're
7 wasting our time.

8 MR. WELCH: The flip side of that, Your Honor, is
9 Harleysville's position, are they willing to discontinue the
10 DJ action. If they're willing to discontinue the DJ action,
11 we'll contribute some to this resolution and all cases go
12 away.

13 THE COURT: Well, then you two step outside and
14 talk about that and tell me if you can resolve it, how about
15 that. Because there is the hangup right here, you two. So
16 you go outside, you tell me if you can come to some
17 resolution right now within the next 15 minutes whether or
18 not you have a proposal to contribute to the settlement
19 between the two of you that's going to resolve this thing.

20 There is no sense of me doing a dance any longer.
21 Because you're telling me you're not going to consent even if
22 I resolve it with everybody else. Everybody else is willing
23 to resolve this case somewhere between a million and a
24 million-five, and that can happen today, but doesn't make
25 much sense for them to do that if you're saying I'm not

1 consenting to that on behalf of my client. And, you know,
2 you have an insured client here that's paid for your coverage
3 and your policy and you're telling him you have no
4 responsibility is basically what you're saying.

5 MR. WELCH: Respectfully, Your Honor, our position
6 is Harleysville also provides the policy here, has the
7 coverage and the limits, and could settle the case at a
8 million and discontinue the DJ action.

9 THE COURT: Step outside and you can let me know.
10 Do you want to put something on the record?

11 MR. KALIK: I just want to say, although I think
12 it's perfectly reasonable to consent to the reasonableness of
13 the settlement, we've withdrawn that, so we're ready to go
14 forward whether they consent or not. We'll take the risk and
15 let them litigate that issue, because I am fully confident
16 that this settlement is going to be upheld as reasonable. I
17 just want the record to be perfectly clear of our position.

18 MR. PERKINS: I agree with that.

19 THE COURT: Okay. Gentlemen, I'm going to ask you
20 to step out and talk. I'm going to ask everybody to step out
21 and I want to talk to plaintiff's counsel, and then I'm going
22 to see what you have to bring, Peter, and Agri-Mark, if you
23 could. We're going to go off the record.

24 (Recess for discussions off the record.)

25 THE COURT: We'll go on the record. We started

1 this settlement conference at 11:00. It's now almost 2:00.
2 It's my understanding the parties have a partial agreement to
3 settle the majority of this litigation. And I'm going to ask
4 plaintiff's counsel to put on the record the settlement
5 understanding that you have reached with the parties that
6 you've reached it with and what it is. And then if anybody
7 else wants to put anything on the record to clarify his
8 statement and understanding of the settlement, we'll allow
9 you to do that. Go ahead, sir.

10 MR. ROSE: Thank you, Your Honor. Our
11 understanding of the settlement of the case in front of this
12 Court, which is Great Lakes Cheese of New York versus
13 Agri-Mark, and Agri-Mark's third-party case against M&T, is
14 that the case will be settled with a payment of \$1 million
15 that will be paid by Harleysville in this matter, and then an
16 additional \$50,000 paid by Agri-Mark, and there will be a
17 \$25,000 contribution from Mr. Thomas and M&T. That
18 contribution will be a cost recovery for us of our costs
19 because this delay has ended in that amount, which we don't
20 know what that cost has been to us. So that is the monetary.

21 There will be dismissals with prejudice of this
22 case by the plaintiffs and also by the third-party plaintiffs
23 and the cross claimants. I guess there was no cross
24 claimant. Third-party plaintiffs. We also will dismiss with
25 prejudice the case that has been filed by Great Lakes Cheese

1 against M&T in the state court action. I understand releases
2 will be sent to us by Mr. Tomko and I assume also by
3 Harleysville counsel quickly. The settlement will be funded
4 and will be paid by year-end. And I think we've had
5 agreements that the checks will be cut and will be paid by
6 the end of the year, contingent on the releases, in a quick
7 manner and we will commit to turn those around.

8 And Wesco is not a party of this, we didn't make a
9 claim. So as far as we know, they are not contributing to
10 any part of it. I think that's my understanding unless there
11 is something else.

12 MR. KNYCH: For the record, the state court action
13 that will be dismissed with prejudice is entitled Great Lakes
14 Cheese of New York, Inc. versus Bernard Thomas and Penny
15 Thomas d/b/a M&T Transport, index number 2015-2594, Supreme
16 Court, State of New York, Jefferson County.

17 THE COURT: Anybody else for the record?

18 MR. KALIK: Thank you, Your Honor. This does not
19 resolve, the settlement today does not resolve the Southern
20 District action that my client initiated against Wesco for
21 seeking reimbursement of defense and indemnity, and we
22 specifically preserve that case and do not waive our claims
23 in that case.

24 THE COURT: Okay.

25 MR. TOMKO: On behalf of Agri-Mark, we will be

1 contributing \$50,000 toward the settlement. We will forward
2 a general release to Great Lakes Cheese. We will forward a
3 stipulation of dismissal to all parties, and it will include
4 a discontinuance of any and all claims over and against
5 Bernard Thomas and Harleysville to resolve this matter fully
6 and fairly. Agri-Mark is not a party to the state court
7 matter, so we will not be producing or providing stipulation
8 on that.

9 MR. PERKINS: So stipulated.

10 MR. ROSE: Your Honor, one comment. I'm sure that
11 that's not what Mr. Tomko meant. He said general release.
12 The release will pertain to this incident. Obviously, if he
13 wants to give anybody general releases, it will be a release
14 specifically designated to this case.

15 MR. TOMKO: It will be a specific release, Your
16 Honor, sorry about that.

17 THE COURT: Anything else that needs to be put on
18 the record? With the understanding of the parties that no
19 part of this settlement is going to resolve anything or
20 dismiss any of the parties out of the Southern District case.
21 That's understood?

22 MR. ROSE: I guess I can ask, Lance, is there any
23 need for Great Lakes Cheese to be part of that case or can
24 they be dismissed out of that case?

25 MR. KALIK: We'll talk off line, but as long as the

1 parties agree to be bound by whatever that judgment is and
2 they're not facing any downstream claim.

3 THE COURT: There is a rule, Rule 41, that any
4 dismissal of an action needs to be stipulated by all parties.
5 So just so you understand that going forward, so Wesco --

6 MR. ROSE: Do you have any objection? Do you want
7 Great Lakes Cheese to continue to be a party? Just a matter
8 of us having to deal being ordered to come to Manhattan for
9 pretrials or anything.

10 MR. WELCH: I understand you guys were having that
11 discussion off line and we'll certainly participate in that
12 discussion.

13 THE COURT: I just want to be clear on the record
14 that, you know, nothing we're doing here today affects that
15 Southern District case.

16 MR. ROSE: We understand.

17 THE COURT: Very well. I want all parties to
18 understand.

19 MR. TOMKO: We're going to make the same request on
20 behalf of Agri-Mark, but again we'll discuss that off line.

21 THE COURT: What you work out with regard to that
22 Southern District case is between the parties and nothing we
23 do here today is going to affect that. Okay?

24 MR. TOMKO: Yes.

25 THE COURT: All right, gentlemen. Thank you for

1 your efforts. I apologize for my frustration at one point
2 but I'm glad that this is resolved. I think it's reasonable.
3 I think it's appropriate. And I hope that you can get the
4 Southern District case worked out too. May take some more
5 effort. As you know, it was my hope to get a global
6 settlement today. It didn't happen. But I'm very happy you
7 were able to resolve this aspect and people can continue to
8 do business in a very small industry in a cooperative way,
9 it's a good sign.

10 So I want to thank you all for your participation
11 and cooperation and safe home. Good luck and happy holidays.

12 MR. ROSE: We appreciate it.

13 MR. TOMKO: Thank you, Judge.

14 THE CLERK: Court's adjourned.

15 *

*

*

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T I O N

I, EILEEN MCDONOUGH, RPR, CRR, Federal Official
Realtime Court Reporter, in and for the United States
District Court for the Northern District of New York,
do hereby certify that pursuant to Section 753, Title 28,
United States Code, that the foregoing is a true and correct
transcript of the stenographically reported proceedings held
in the above-entitled matter and that the transcript page
format is in conformance with the regulations of the
Judicial Conference of the United States.

A handwritten signature in cursive script, appearing to read "Eileen McDonough", is positioned above a horizontal line.

EILEEN MCDONOUGH, RPR, CRR
Federal Official Court Reporter